

EXHIBIT 9

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9 Attorneys for
10 Motion Picture Studios Plaintiffs

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION
14

15 WARNER BROS.
16 ENTERTAINMENT INC.,
COLUMBIA PICTURES
17 INDUSTRIES, INC., DISNEY
ENTERPRISES, INC., PARAMOUNT
18 PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM
19 CORPORATION, and UNIVERSAL
CITY STUDIOS PRODUCTIONS
20 LLLP,

21 Plaintiffs,

22 vs.

23 WTV SYSTEMS, INC. and WTV
SYSTEMS, LLC d/b/a ZEDIVA, and
24 VENKATESH SRINIVASAN,

25 Defendants.

CASE NO. 2:11-cv-02817-JFW-E

DECLARATION OF THOMAS
GEWECKE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

Date: July 25, 2011
Time: 1:30 p.m.
Judge: Hon. John F. Walter
Ctm: 16

[Filed concurrently herewith:

- (1) Notice of Motion and Motion and Memorandum of Points and Authorities;
- (2) Declaration Of Carolyn Hoecker Luedtke;
- (3) Declaration Of Kelly M. Klaus; and
- (4) [Proposed] Order]

1 I, Thomas Gewecke, declare as follows:

2 1. I am the President of Warner Bros. Digital Distribution ("WBDD"), a
3 position I have held since January 2008. WBDD is a division of Warner Bros.
4 Home Entertainment Inc., which in turn is a wholly owned subsidiary of Warner
5 Bros. Entertainment Inc. ("Warner"). WBDD oversees the digital distribution of
6 Warner's content. I submit this declaration in support of the application by the
7 Motion Picture Studio Plaintiffs in this action (collectively, the "Studios") for a
8 preliminary injunction to prevent the Defendants from operating their Zediva
9 service. Except as expressly noted, the facts stated herein are known to me
10 personally. If called upon and sworn as a witness, I could and would testify
11 competently to the contents of this Declaration.

12 2. As President of WBDD, I have become thoroughly familiar with
13 Warner's efforts to provide consumers with various means of accessing
14 entertainment content – primarily movies and television shows – for viewing at
15 home and on portable devices. WBDD, among other activities, makes content
16 available to view for a fixed period ("transactional video on demand" or "VOD"),
17 sale ("electronic sell through"), and through subscription video on demand models
18 ("subscription VOD"). WBDD is primarily in the business of licensing the rights to
19 engage in such digital distribution of Warner content to third party distributors,
20 including multichannel video programming distributors ("MVPD") such as cable,
21 satellite, and telecommunications companies (e.g., Comcast, DirecTV, Verizon);
22 online retailers who deliver directly over broadband internet connections (e.g.
23 Apple iTunes, Amazon, Netflix, Sony's Playstation Network, Microsoft's XBOX
24 360 platform); providers of in-room hotel entertainment (e.g. LodgeNet); and
25 wireless operators (e.g. Sprint) who deliver directly to mobile phones. WBDD also
26 makes content available directly to consumers in select cases (e.g. through
27 Facebook, the Apple iOS "App" platform, and Warner's own web sites). Warner
28 also licenses certain digital on demand rights as part of its pay and linear television

1 licensing arrangements (e.g. HBO Go, or bundled on demand rights licensed to
2 cable networks).

3 3. Through these distribution relationships that I have described, Warner
4 content is made available in digital form very widely, such that, for example, a
5 “new release movie” from Warner (i.e. a movie that has just been made available
6 on DVD) is generally available to view as a transactional VOD offering in
7 approximately 87 million VOD-capable households in the US with digital cable,
8 satellite, and Verizon FiOS / AT&T uVerse services, as well as to essentially every
9 household with an active broadband connection. Through my position and
10 knowledge of publicly available information about the analogous efforts of others
11 in the marketplace, I also have knowledge about the general nature of the different
12 means other Studios in the marketplace use to give consumers access to their
13 content.

14 4. Through this declaration, I will describe Warner’s digital distribution
15 business and its specific strategies for the distribution of its copyrighted works,
16 including the practice of making our content available to consumers through
17 different business models at different points in each title’s lifecycle, according to a
18 carefully calibrated and finely tuned schedule of release plans and usage rules (a
19 practice sometimes referred to as “windowing.”) I am aware that the other Studios
20 engage in forms of “windowing” their films, and that the windows vary by Studio
21 and can even vary by film. Where I am aware of the actions of other Studios
22 through market research and/or my own observations of the industry, I will offer
23 observations more broadly about the Studios and the marketplace generally.

24 5. I understand that Defendants market a new service called Zediva
25 through which a consumer can pay \$1.00 to \$1.99 to view a movie for 14 days,
26 including movies from Warner like *The Dark Knight*, *Cop Out*, and *Invictus*. I
27 further understand that Zediva claims that consumers “rent” a DVD and a DVD
28 player in a Zediva facility, and that Zediva then transmits the contents of that DVD

1 by means of the Internet to consumers on their computers, televisions, and mobile
2 devices. Zediva does not have a license agreement with Warner to distribute,
3 transmit, or use any of Warner's copyrighted works.

4 6. As set forth in more detail below, Zediva's unlicensed presence in the
5 marketplace threatens immediate and irreparable harm to Warner's business, and to
6 the business of the other Studios.

7 WARNER'S BUSINESS

8 7. Warner, like any other motion picture studio (indeed, like any other
9 business trying to succeed in the marketplace), is intensely focused on developing
10 and offering products and services to meet customers' existing and emerging
11 choices -- and doing so at price points tailored to those choices. To that end,
12 Warner has observed that customers' lifestyles have changed as technology has
13 evolved. We view these changes as opportunities, and we strive every day to
14 anticipate and meet evolving consumer desires in ways that respect our ownership
15 interest in movies that cost many millions of dollars to produce.

16 8. Currently, Warner and the other Studios -- individually and through
17 their affiliates and licensees -- offer a wealth of options for how consumers can
18 access movies: they can go to the theater, buy a copy of the movie (on DVD or
19 Blu-ray Disc), rent a copy (at a bricks-and-mortar store or through a mail
20 subscription service like Netflix), download and buy a permanent copy through a
21 service like Amazon, access it on demand for a fixed period of time through a
22 cable, satellite or Internet delivered VOD platform like Comcast, DirecTV, or
23 Vudu, view it through subscription VOD streaming services like Netflix, watch it
24 on a scheduled subscription cable television channel like HBO (or its own on
25 demand service), or eventually watch it in an ad-supported format on network
26 television.

27 9. According to IHS Screen Digest, in 2010 consumers worldwide spent
28 a combined \$55 billion watching movies. Less than 45 percent of that amount was

1 from the original theatrical distribution; more than 55 percent comes from home
2 entertainment distribution. Within that home entertainment portion, there is an
3 ongoing general shift in the industry from the physical (DVDs and Blu-ray Discs)
4 to digital (electronic sell through, transactional VOD, and subscription VOD).
5 Because revenue from the home entertainment segment is so significant, it plays an
6 important role in the studio "green light" process that helps determine whether to
7 produce or distribute any given movie. Thus, a threat to Warner's home
8 entertainment revenues would also threaten our ability to continue to develop future
9 movies. Consequently, growing the digital home entertainment business is a
10 central strategic priority for Warner.

11 10. Among the many options within the home entertainment category,
12 transactional VOD is an important and rapidly growing segment. Consumers can
13 access movies using VOD from many different providers, including virtually every
14 significant provider of multichannel video services, and from many online
15 providers (e.g. Apple iTunes, Sony, Microsoft, Amazon, Walmart (Vudu), Best
16 Buy (CinemaNow), and others). Consumers navigate to the movie of their choice
17 through an interface on their television, a desktop software client, or a web browser,
18 select the movie, pay, and then the movie can be streamed or downloaded to a
19 computer, handheld device, or television for a fixed period of time for a fixed price.
20 Authorized transactional VOD options are continuing to grow and evolve. For
21 example, starting in March 2011, Warner began to make selected movies available
22 on demand on Facebook. Upon payment, the movie was available to the customer
23 for a fixed period of time to view at their convenience.

24 11. In addition to transactional VOD, Warner also makes its titles
25 available through other means of distribution, months or years after it has made
26 them available through transactional VOD. For example, after a title has been
27 available through transactional VOD for approximately 5 months, it is generally
28 then made available through subscription pay television services like HBO. Several

1 years after a title has been available through VOD, it may be made available for
2 linear broadcast on network television. Going in the other direction, Warner and
3 several other studios are currently conducting a test with DirecTV for video on
4 demand films that will be available, for a premium price, 60 days after the theatrical
5 release (i.e. often 1 or 2 months before they are made available for sale on DVD).
6 These separate means of viewing movies are commonly called distribution
7 “windows.”

8 12. While the specific implementation of a “window” distribution strategy
9 will vary from Studio to Studio, the fact is that a Studio’s ability to “window” its
10 releases is a fundamental component of any Studio’s distribution strategy. Warner
11 has implemented its own individual “windowed” distribution strategy through our
12 licensing and distribution agreements with third parties. Specifically, Warner
13 negotiates with each third party how much the third party will pay for the right to
14 distribute our copyrighted works to its customers, when it will have those rights,
15 and what if any conditions will be imposed on the distribution rights. Some
16 distributors in the earlier windows may pay more for the right to distribute a movie
17 earlier because that movie will be new, or newer, to the movie-watching public.
18 Other distributors in later windows may pay less for the right to distribute a movie
19 because that movie has had more exposure to the movie-watching public by that
20 point. Relatedly, third parties in later windows often negotiate restrictions on
21 Warner aimed at limiting how much exposure the movie will get in earlier periods.
22 These restrictions, then, influence our negotiations with third parties for rights to
23 distribute our movies in earlier windows. Still other distributors, such as
24 subscription pay television providers, pay more for the *exclusive* right to transmit a
25 copyrighted work during a particular time period. As a result, Warner then
26 negotiates restrictions on third parties in earlier windows to prevent transmission
27 during the exclusivity periods.

28 13. Traditionally, these “windows” for the home entertainment market that

1 are negotiated with third parties begin with the right to sell a DVD or Blu-ray Disc,
2 or to license and download an electronic sell through copy on the initial post-
3 theatrical home video release day. On the same day that the movie is released on
4 DVD and electronic sell through (often called "day and date"), Warner licenses it
5 for availability on transactional VOD, and it appears for DVD rental in bricks and
6 mortar rental stores. The retail price for a new release VOD movie through a
7 licensed distributor like Amazon or Vudu ranges from \$3.99 to \$5.99. Then, 28
8 days after the initial home video release date, Warner makes the movie available
9 through DVD rental subscription mail services like Netflix or kiosks like Redbox.
10 Approximately five months after the home video release, Warner licenses films to
11 appear exclusively on subscription pay television.

12 14. To create these "windows," Warner studied consumer preferences,
13 negotiated with third parties, and worked to provide a variety of choices at different
14 times and different price points to meet consumer preferences. The critical
15 economic point of the "windowing" process is that it enables a Studio, like Warner,
16 to try to match different customer offerings with the willingness of customers to
17 pay for those offerings. In general, the sooner the movie is available for viewing,
18 the higher the price premium a Studio can charge for that offering. This structure
19 allows each Studio to maximize the overall value of its movies, and thereby cover
20 the enormous costs and risks that the Studio takes in making movies.

21 15. In Warner's agreements with distributors and licensees, those parties
22 agree to pay Warner certain fees for the rights granted (e.g. a percentage of the
23 revenue received from consumers with a minimum fixed fee per transaction).
24 Moreover, Warner's agreements contain various provisions that govern the
25 distribution of the content. Examples include the following: (a) detailed provisions
26 requiring technological measures to protect the security of the transmission of the
27 movie to ensure against unlawful access, copying and piracy, (b) provisions
28 requiring a certain level of quality for the movie's display, to ensure that consumers

1 are receiving appropriate value, (c) restrictions on making the movie available
 2 during certain blackout periods where other licensees have paid for exclusive rights,
 3 and (d) limitations on the duration of the viewing period for any single VOD
 4 transaction (e.g. 48 hours) along with various other usage rules, terms, and
 5 conditions.

6 **ZEDIVA'S SERVICE CREATES IMMEDIATE RISKS OF IRREPARABLE**
 7 **HARM TO WARNER AND TO ALL SIMILARLY SITUATED**
 8 **COPYRIGHT OWNERS**

9 16. Zediva threatens a variety of serious and irreparable harms to Warner
 10 and the other Studios if it is not shut down.

11 17. *First*, Zediva's practices deprive Warner and the other Studios of their
 12 exclusive rights to exploit their copyrighted works. The Zediva service takes away
 13 the Studios' exclusive right to determine how, when, and to whom their
 14 copyrighted works are distributed. Warner has expended enormous amounts of
 15 time and money to develop its own individual strategy through which it is able to
 16 provide customers choices of different ways to view its copyrighted work at
 17 different locations, times, and price points to maximize value to both consumers
 18 and Warner. Further, in implementing its strategy, Warner has made agreements
 19 with third party licensees about when, where, and how its copyrighted works will
 20 be distributed by Warner and other licensees, and Zediva's unauthorized
 21 transmission of Warner's movies threatens to harm the relationships Warner has
 22 built with those third parties.

23 18. Let me provide an example of how Zediva harms the Studios'
 24 exclusive rights to control how, where, when, and for how much consumers access
 25 their copyrighted works. Warner sells to subscription paid television the *exclusive*
 26 rights to transmit certain copyrighted work for a fixed period of time in certain
 27 windows.¹ The price for those deals is based, in part, on the grant of exclusivity.

28 ¹ I do not believe Warner is unique in having exclusivity arrangements. I am

1 During the exclusivity period, Warner restricts other VOD providers from offering
2 the particular movie. However, since Zediva operates illegally without any license
3 from Warner, it risks making our copyrighted works available during exclusivity
4 periods, thus interfering with Warner's contractual commitments, its relationship
5 with its licensees, its ability to negotiate similar deals in the future, and its overall
6 efforts to control its copyrighted works in a manner that maximizes value for
7 Warner and consumers.

8 19. Similarly, Zediva takes away Warner and the other Studios' right to
9 control the security with which their copyrighted works are transmitted to the
10 public and the steps that are taken to prevent unauthorized access, copying, and
11 piracy. Internet transmissions of digital content can be insecure. This is what has
12 given rise to the elaborate digital rights management ("DRM") technology. Before
13 Warner licenses any third party to transmit our copyrighted works, we do a
14 thorough and detailed review of its security protocols. After investigating these
15 security measures, we negotiate stringent copy protection requirements through our
16 license agreements prior to authorizing dissemination of our copyrighted works.
17 Our agreements also contain provisions for steps a licensee must take if there is a
18 breach of that security. Because Zediva's transmission of Warner's copyrighted
19 works is unauthorized, Warner has no ability to ensure that appropriate steps are
20 taken to protect security. Relatedly, Warner imposes restrictions on how
21 copyrighted works are transferred by a customer between different devices (i.e.,
22 between an i-Pad and a computer). Our license agreements with VOD providers
23 include limitations on how many devices can receive a particular VOD purchase,
24 how the authorized provider must track the transfer of a VOD movie between a
25 consumer's devices, and how the clock is maintained during those transfers. We
26 put these restrictions in our agreements with VOD providers to protect Warner's

27 generally aware from press reports and market observation that other Studios have
28 licensing deals with some exclusivity provisions.

1 copyrighted works from massive illegal copying and piracy, a problem that
2 threatens serious harm to our ability to control our copyrighted works.

3 20. *Second*, Zediva's practices threaten the VOD market. This presents a
4 threat of harm to Warner and the Studios given the growing importance of VOD
5 within the home entertainment industry. Zediva threatens VOD in several ways.

6 21. To begin, by making our copyrighted works available through the
7 Internet early in the distribution cycle, without a license to do so and without
8 paying for the right, Zediva directly undermines the entire ecosystem of legitimate
9 video on demand. Based on its website, the primary value proposition that Zediva
10 purports to deliver to consumers is the ability to "Watch the latest DVDs over the
11 Internet right now" "for \$1.00" for "14 days". By contrast, legitimate, authorized,
12 licensed VOD providers during this same "window" generally offer those same
13 titles for a higher price (for example, on iTunes, new release movies are generally
14 available for \$3.99 or \$4.99 per rental), and often only enable a 24 or 48 hour
15 viewing period. The commercial terms set by such legitimate, authorized retailers
16 reflect the terms of the licensing arrangements those providers have negotiated with
17 Warner and other content owners. By making available an unauthorized service
18 with a consumer proposition that is seemingly superior, though only by virtue of
19 Zediva's misappropriation of Warner's content, Zediva threatens the business of all
20 those distributors who have negotiated legal, authorized licenses with Warner and
21 other studios, and creates confusion among consumers, who will not understand
22 why their current provider (e.g. Comcast, Apple iTunes, Walmart, Amazon) cannot
23 provide a VOD offering on similar terms during the same time period.

24 22. Note that Warner does make its titles available in physical disc form to
25 discount rental retailers (e.g. Redbox and Netflix) who generally charge a lower
26 price to consumers (e.g. Redbox charges consumers \$1 per night for DVD rentals
27 from its stand-alone kiosks). However, these providers generally operate in a later
28 window than VOD retailers (Netflix and Redbox make Warner new release movies

1 available 28 days after they are made available through VOD services, and do not
2 have the right to transmit new release movies from Warner in VOD form at all).
3 Zediva appears to be seeking explicitly to contrast its offering with that of Redbox
4 and Netflix, asserting on its home page that titles are available “before Netflix and
5 Redbox,” albeit at a similar price. Thus, again, Zediva threatens to undermine the
6 carefully constructed and individually negotiated commercial arrangements that
7 Warner has put in place with its distributors and licensees, and to sow confusion
8 amongst consumers who will not understand why other VOD providers cannot
9 offer similar terms.

10 23. In addition, I am very concerned that Zediva will irreparably harm the
11 legitimate development of the VOD market by providing a sub-optimal consumer
12 experience, thereby tarnishing consumer perception of VOD generally. We are
13 expending significant time and resources to provide the best possible consumer
14 experience for each distribution channel. Because of the premium nature of the
15 VOD market (*i.e.*, it commands a higher price per rental) and the newness of that
16 market, we are working particularly hard to educate consumers about their VOD
17 options and to ensure a positive consumer experience for VOD users. For example,
18 in 2010 the Cable and Telecommunications Association for Marketing (CTAM)
19 organized and administered a VOD awareness marketing program, funded by many
20 MSOs and studios, that invested more than \$25 million in national advertising
21 efforts to raise awareness about the convenience and quality of video on demand as
22 a movie rental option. In addition, Warner invests significant amounts of money to
23 market and promote the availability of each of its movie titles on VOD, both in
24 VOD-specific advertising and through the promotion of VOD as a rental option in
25 its DVD marketing.

26 24. One significant problem Zediva presents for the VOD consumer
27 experience is that the availability of any particular title is limited by the number of
28 physical DVDs and DVD players it has available at any given time. Therefore, I


1 understand from looking at Zediva's website that a Zediva consumer may be told
2 that the movie he wants is out-of-stock, even during the 14-day access period. This
3 message of unavailability is inconsistent with the idea of video "on demand" and
4 risks causing consumer frustration and confusion, thereby hurting the broader VOD
5 market. This is of particular significance since the "always available, never out of
6 stock" character of VOD is one of the essential differentiating characteristics of the
7 VOD experience from that of traditional, physical DVD rental.

8 25. Zediva also threatens to provide a sub-optimal viewing experience for
9 its customers, further undermining VOD. For instance, before licensing a third
10 party to transmit our movies, Warner vets that entity to ensure that it will provide a
11 high quality movie experience to customers. In contrast, Warner has no control
12 over the quality of the transmission of the movies from Zediva and thus I worry that
13 poor quality transmissions could lead to consumer dissatisfaction and damage to
14 consumer perception of VOD.

15 26. It is my strong belief that these harms to the VOD market, though they
16 are likely to be very significant, will be extremely hard to measure in dollar terms.
17 It will be extraordinarily difficult to assess what impact Zediva has on the VOD
18 market, and how much of that it is a result of negative consumer experiences with
19 services like Zediva, and even more difficult to assess the affect on Warner and the
20 other Studios of the disruption of their relationships with legitimate licensees.

21 27. For these reasons, Warner and the other Studios will suffer immediate
22 and irreparable injury unless the Court acts to enjoin Zediva's service.

23
24 I declare under penalty of perjury under the laws of the United States that the
25 foregoing is true and correct. Executed on May 26, 2011 at Burbank, California.

26 
27 Thomas Gewecke
28